FOR ARGUMENT

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No. 79-116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

HALLEY I. THOMAS,
Petitioner

v.

WASHINGTON GAS LIGHT COMPANY,

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF OF PETITIONER

LEE C. ASHCRAFT
MARTIN E. GEREL
JAMES A. MANNINO
MARK L. SCHAFFER
JAMES F. GREEN
2101 L Street, N.W.
Suite 303
Washington, D.C. 20037
Attorneys for Petitioner

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REPLY BRIEF OF PETITIONER

The claimant, Halley I. Thomas, responds to the brief of the Washington Gas Light Company and petitions this Honorable Court for reversal of the judgment of the United States Court of Appeals for the Fourth Circuit.

QUESTIONS PRESENTED

I. Whether the plain language of the District of Columbia statutory provision, 33 U.S.C. § 930(f), tolling the one year limitation period, should be disregarded in order to disallow an employee's meritorious claim for compensation.

II. Whether an employee's meritorious claim for compensation in the District of Columbia is preempted merely because his injury is also compensable under the Virginia Workmen's compensation Act.

III. Whether the full faith and credit clause operates to make approval by the Industrial Commission of Virginia of a workmen's compensation agreement a bar to an award for permanent disability under the compensation law of the District of Columbia.

STATEMENT OF THE CASE

The petitioner, Halley I. Thomas, adopts and incorporates herein by reference the Statements of the Case set forth in his petitioner's brief on the merits and the brief for the federal respondent, Director, Office of Workers' Compensation Programs.

ARGUMENT

I. The Plain Language Of The District Of Columbia Statutory Provision, 33 U.S.C. § 930(f), Tolling The One Year Limitation Period, Should Not Be Disregarded In Order To Disallow An Employee's Meritorious Claim For Compensation.

The construction of § 30(f) of the Longshoremen's Act urged by the employer undermines the unambiguous language of the statute. The Act compels an employer to file a report of injury with the Deputy Commissioner within ten days of an employee's injury or death. 33 U.S.C. § 930(a). Under the District of Columbia Act, this mandate applies "in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs." 36 D.C. Code § 501. Despite being subject to this statutory duty, the Washington Gas Light Company neglected to file any such report of injury.[1] The consequences thereof are straightforwardly described by 33 U.S.C. § 930(f):

> Where the employer or the carrier has been given notice, or the employer . . . or the carrier has knowledge, of any injury or death of an employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of Section 913 of this title shall not begin to run against the claim of an injured employee . . . until such report shall have been furnished as required

[1] That the employer may have filed an injury report in Virginia is of no avail. The Act specifies that the report must be "furnished as required by the provisions of subdivision (a) of this section." 33 U.S.C. § 930(f). The report must contain specified information and be sent to the Secretary of Labor and the "deputy commissioner in the compensation district in which the injury occurred." 33 U.S.C. § 930(a). Under the approved regulations, the "employer's report of an employee's injury shall be in writing on a form prescribed by the Director for this purpose." 20 C.F.R. § 702.202.

Moreover, the filing in Virginia could not possibly accomplish the purposes ascribed to the District report of injury. For these reasons, the District of Columbia Circuit has expressly rejected the argument that a Virginia report of injury satisfies the District of Columbia mandate. See *Director, OWCP* v. *National Van Lines, Inc.*, No. 78-1259 (D.C. Cir. 1979) (slip op.).

by the provisions of subdivision (a) of this section.

Traditionally, this Section has been literally and rigidly construed. For example, in *Aerojet-General Shipyards, Inc.* v. *O'Keefe,* 413 F.2d 793 (5th Cir. 1969), the Court considered the claim of an employee who had suffered an ankle injury in August of 1964. Within the statutory period, the employer filed a report concerning the injury. The employee was awarded compensation and never returned to work. While off the job, the injured workman was informed by a physician that he was suffering from arthritis and fibrosis which had been aggravated by his employment. For these injuries, he filed a claim in 1966. The employer challenged the timeliness of the claim despite its failure to file a second report. The Fifth Circuit announced that:

> We hold that the plain language of 33 U.S.C. § 930(f) requires an employer with knowledge of an injury, to file a report for that injury, whether or not the employee is at the same time disabled from an earlier injury. Therefore, the statute of limitations was tolled, and the employee's claim was timely filed regardless when he may have arguably received notice of a work-related disease.
>
> 413 F.2d at 796.

Washington Gas Light's objection that a literal interpretation of § 30(f) in the present case would be unduly mechanistic underestimates the importance of the employer's report of injury in the District of Columbia workmen's compensation scheme. The Longshoremen's Act is designed to be "almost self-executing." *Flowers* v. *Travelers Insurance Company,* 258 F.2d 220, at 225 (5th Cir. 1958). Benefits are encouraged to be paid promptly and voluntarily without the coercion of an award. 33 U.S.C. § 914(a). To that end, the Act places the onus upon the employer, rather than the employee, to take affirmative action with respect to industrial injuries. This approach is grounded in the notion that the employer is best equipped to protect the claimant's rights. In all likelihood, the employer possesses greater familiarity with the Act and the procedures involved in securing compensation benefits. Placing the burden on the employer insures that meritorious claims to compensation are not foregone merely due to the claimant's uninformed position. Hence, the Act mandates that the first installment of compensation benefits must be paid within fourteen days "after the employer has knowledge of the injury or death . . ." even without the coercion of a formal award. 33 U.S.C. § 914(b); *See also* 20 C.F.R. § 702.231. A failure to begin payment subjects the employer to a 10% penalty on any and all past due and unpaid installments. 33 U.S.C. § 914(e). The employer may only escape the voluntary initiation of compensation benefits by filing with the Deputy Commissioner a notice controverting the employee's right to compensation under the Act. 33 U.S.C. § 914(d).

The employer's report of injury is the catalyst in the system that triggers these provisions into operation. The success of the self-executing design of the Act hinges upon the filing of the employer's report of injury. The report signals that the employer has notice or knowledge of the accidental injury and "sets in train important substantive obligations *unless* the employer takes affirmative action to controvert liability." *Atlantic & Gulf Stevedores, Inc.* v. *Donovan,* 274 F.2d 794, at 799 (5th Cir. 1960). Upon filing the report, the

employer is required to decide quickly either to fish or cut bait—that is, pay or controvert. Thus, the Fifth Circuit did not overstate the point by noting that "... [t]he heart of any such system is the mandatory report of an injury by the employer within 10 days under § 930(a)." *Flowers* v. *Travelers Insurance Company,* 258 F.2d 220, at 225 (5th Cir. 1958).

To insure that employers do not sidestep these obligations, the Act suspends the one year limitation period until the report of injury is furnished. 33 U.S.C. § 930(f). The provision was added as an amendment to the statute when it became clear that some employers were disregarding the mandate to file injury reports. The full text of the relevant section of the committee report cited by the Respondent (Resp. Br. at 15), (H.R. Rep. No. 1945, 75th Cong., 3d Sess., at 9 (1938), quoted in S. Rep. No. 1988, 75th Cong., 3d Sess., at 9 (1938)) reads:

> It has sometimes happened that reports of injuries have not been transmitted to the deputy commissioner as required by the Longshoremen's Act and, subsequently, when the injured workman has filed claim for compensation after the time limitation fixed in the act has expired, this delay, rather than any lack of merit in the claim, has been relied on to avoid payment of compensation. *No doubt in some cases the delay in filing claim has been due to ignorance on the part of the employee, which would have been remedied if the procedures under the Act had been set in motion by the filing of the report of injury.* It may be that in some cases the report of injury has been withheld by the employer with the intention of defeating the employee's claim through the delay which might thus result. *In some cases, other payments, or payments as wages, have been made during the year limitation, thus diverting the attention of the employee from the necessity to file claim and, shortly after the expiration of the year, such payments have been stopped and the limitation pleaded in bar of the claim. The purpose of this amendment is to remove any possible motive to withhold such reports of injury* by mandating the bar of the limitation upon the right to file a claim begin to run only after such report of injury has been filed, in all cases in which the employer or insurance carrier in fact possessed the information upon which to make the report. (emphasis added)

Contrary to Washington Gas Light's position, disregard of the plain language of the statute would undercut the very purpose of the provision. The tolling provision was enacted to prevent the defeat of valid claims solely because of the claimant's ignorance of his statutory remedy. Such a purpose is undoubtedly relevant to the particular facts of the present controversy. Moreover, Mr. Thomas' uninformed acceptance of Virginia benefits is the kind of diversion from the more generous remedy available in the District of Columbia which Congress sought to frustrate.

It is abundantly clear, therefore, that the legislative purposes of the section are only served by its literal enforcement. Had the employer complied with the statute, Mr. Thomas would probably not be in the situation he is in now. As a general policy, the Deputy Commissioner's office, upon receipt of an injury report, mails to the employee a notice apprising him of his rights accompanied by a standard claim form. In addition, if an employer controverts the employee's right to compensation, a copy of the notice of controversion must be mailed to the claimant. 20 C.F.R. § 702.251.

Thus, the employee is again reminded of his right to compensation under District of Columbia law.

Instead, Mr. Thomas remained unaware of his rights. Unsuspectingly, Mr. Thomas accepted the much less generous benefits afforded by the Virginia compensation statute. Now the employer not only asks that the tolling provision be disregarded but also offers the Virginia settlement agreement as a *res judicata* bar to the District of Columbia award. The petitioner urges that the clear pronouncement of the statute, the legislative motives which prompted its enactment, and common notions of equity dictate otherwise.

II. An Employee's Right To Compensation In The District Of Columbia Is Not Preempted Merely Because His Injury Is Also Compensable Under The Virginia Workmen's Compensation Act

The Longshoremen's and Harbor Workers' Compensation Act was enacted in response to decisions by this Court which foreclosed previous congressional attempt to cover longshoremen by extending the coverage of the state compensation acts. The Senate committee endorsing the adoption of the Act reported that:

> If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation, but unfortunately, they are excluded from these laws by the character of their employment; and they are not only excluded but the Supreme Court has more than once held that Federal legislation can not, constitutionally, be enacted that will apply state laws to their occupation.
>
> S. Rep. No. 973, 69th Cong., 1st Sess., at 16 (1927).

A special jurisdictional provision, 33 U.S.C. § 903(a), was included within the Act to confine its operation in a manner consistent with that purpose. The provision imposes a two-fold condition on the coverage of the Act which corresponds to the legislative intent. The injury must occur upon navigable waters and may not be validly compensable under a state compensation statute. This conditional coverage was "necessary in order to confine its provisions to cases in which under the grant to the United States of exclusive admiralty and maritime jurisdiction, the United States alone could validly provide compensation." *Travelers Insurance Company* v. *Cardillo,* 141 F.2d 362, at 364 (D.C. Cir. 1944).

The limiting provisions of Section 3(a) of the Longshoreman's Act are intimately related to constitutional concern over jurisdictional overlap in an area exclusively delegated to the federal government. Such fears are irrelevant to the Act's extension to the District of Columbia and the limitations should not be applied. While it is true that repeal by implication is not favored, it is obvious that § 3(a) cannot be applied to the District of Columbia statute without modification. The portion of the condition relating to navigable waters mst be disregarded or the District Act would represent no additional coverage beyond the Longshoremen's Act. Since some judicial modification is inevitable, this Court should be free to look beyond the literal language of the entire section and seek the genuine intent of Congress.

The true scope of the District of Columbia Act is reflected by its enacting section. That section provides that the District of Columbia Act should apply "in respect to the injury or death of an employee of an

employer carrying on any employment in the District of Columbia, *irrespective of the place where the injury or death occurs.*[2] 36 D.C. Code § 501. This language nullifies the narrow provision of § 3(a) of the Longshoremen's Act and implies a broad application for the District of Columbia Workers' Compensation Act. Surely, Congress was aware that injuries occurring in other jurisdictions would be compensable under other acts. Thus, the all-encompassing scope of the enactment section is not, in any practical sense, consistent with the Respondent's construction limiting the Act's coverage to the rare circumstance in which no other compensation act is applicable. Such a narrow interpretation is particularly inconceivable in view of the statutory presumption that "the claim comes within the provisions of this Act." 33 U.S.C. § 920(a).

In reliance upon these considerations, the District of Columbia Circuit resolved this issue in *Travelers Insurance Company* v. *Cardillo,* 141 F.2d 362 (D.C. Cir. 1944). The employee, a District of Columbia resident, was injured in Maryland.[3] His employer, a construction company principally located in the District, challenged a District of Columbia compensation claim on the basis of the state coverage condition of § 3(a). The District of Columbia Circuit reasoned:

> That Section 3(a) has no proper place in the District Act is obvious and the failure of Congress to

[2] The italicized language was added by the Senate Committee on the District of Columbia (S. Rep. No. 852, 70th Cong., 2nd Sess., at 1 (1928).

[3] In a companion case, the court also held that compensability under the Virginia Workmen's Compensation Act did not preclude recovery in the District of Columbia. *Travelers Insurance Company* v. *Cardillo,* 141 F.2d 364 (D.C. Cir. 1944).

> expressly exclude it was perhaps due to inadvertence, but however that may be, the language of the enactment section of the District Act shows unmistakeably the precise extent and the precise limitations of its jurisdiction and coverage, and these must be given effect, or else the whole purpose of the Act would be lost, and this would be contrary to the established rule of statutory construction . . . To apply the limitations of the Section to the District of Columbia Act would destroy it, make it wholly inoperative and result in an absurdity. For as to the navigable waters it would be a meaningless duplication, and as to the exclusion of injuries compensable under State laws, it would be in the teeth of the language of the local law extending its provisions to cases of injury or death, irrespective of the place where either occurred.
>
> 141 F.2d at 364.

The District of Columbia Circuit's determination of this issue was made soon after the Longshoremen's Act was extended to the District. It has remained virtually unchallenged over the last thirty-five years. The District compensation law has been enforced in accordance with this longstanding precedent for the entire duration of the Act. Moreover, in 1972, one year after Mr. Thomas' injury, the § 3(a) exclusion of coverage for injuries compensable under state law was repealed from the Longshoremen's Act. Thus, any change in the interpretation of this now defunct provision will have little or no prospective jurisprudential value. The petitioner urges, therefore, that any preclusion of coverage for his injury in the District of Columbia based upon § 3(a) is unwarranted.

III. The Full Faith And Credit Clause Does Not Operate To Make Approval By The Industrial Commission Of Virginia Of A Workmen's Compensation Agreement A Bar To An Award For Permanent Disability Under The Compensation Law Of The District Of Columbia.

A. Proper application of this Court's directives in *Industrial Commission* v. *McCartin* compels affirmance of the District of Columbia award

The Fourth Circuit's result in *Pettus* v. *American Airlines, Inc.*, 587 F.2d 627 (4th Cir. 1978), *cert. denied* —— U.S. —— (1979), upon which the decision in the instant case was founded, represented a sharp departure from the previously near universal interpretation of this Court's pronouncement in *Industrial Commission* v. *McCartin*, 320 U.S. 622 (1947).[4] Washington Gas Light's brief has also called for severe limitation of the *McCartin* decision. The petitioner urges that *McCartin* does not admit of such a narrow reading. Rather, accurately applied, *McCartin* controls the present controversy and requires a reversal of the Fourth Circuit.

1. *Magnolia* v. *McCartin*

Both parties agree that there is no irreconcilable conflict between *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430 (1943), and *Industrial Commission* v. *McCartin*, 330 U.S. 622 (1947). However, there is considerable disagreement as to the distinction by which the two cases may be harmonized. Mr. Thomas urges that

[4] The *Pettus* decision and the Virginia Workmen's Compensation Act are considered in detail in an article to appear in the Washington & Lee Law Review Annual Fourth Circuit Review. *See Workmen's Compensation—Fourth Circuit Review*, 37 Wash. & Lee L. Rev. —— (1980).

both decisions, properly viewed, assist his claim for compensation in the District of Columbia.

The limitation of *McCartin* proposed by the Washington Gas Light Company slights the unmistakeable thrust of this Court's unanimous decision. The *McCartin* opinion begins by noting that the Illinois award was not a bar to a successive award in Wisconsin because it was only designed to be final and conclusive *within* the State of Illinois. The decision noted that "there is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, that it is designed to preclude any recovery by proceedings brought in another state." 330 U.S. at 627. Moreover, in view of the rule requiring liberal construction in favor of the injured workman, the Court ruled that one award could not constitute a bar to a successive award without "unmistakeable language by a state legislature or judiciary." 330 U.S. at 628.

The opinion notes in *dicta* that the claimant's care in reserving his right to recovery in Wisconsin strengthened the propriety of the result. However, the Court was careful to preempt any future limitation of *McCartin* which would obscure the true impact of its decision. Following its discussion of the contractual reservation, the Court returned to its original rationale. The possibility of any distinction based upon the contractual reservation was extinguished by the announcement that "the reservation spells out what we believe to be implicit in that Act—namely that an Illinois workmen's compensation award of the type here involved does not foreclose an additional award under the laws of another state." 330 U.S. at 630.

In truth, it is *Magnolia* which is unique. The *Magnolia* majority founded its conclusion that the Texas award was a complete and final determination of all the employee's rights arising from the accident upon the peculiar design of the Texas compensation statute. The Court construed the Texas exclusive remedy provision as encompassing extrajurisdictional compensation recovery within its preclusive purview. The finding was predicated largely upon the implication drawn from Texas judicial decisions barring successive awards in Texas following a prior compensation recovery elsewhere. The importance of this unconventional circumstance is reflected by the majority's statement that "[w]e have no occasion to consider what effect would be required to be given to the Texas award if the Texas courts held that an award of compensation in another state would not bar an award in Texas . . ." 330 U.S. at 443. Therefore, the present case presents the exact question upon which the *Magnolia* majority reserved judgment.

The real lesson of *Magnolia* and *McCartin* is that the preclusive scope and reach of the compensation award received by the claimant, as gleaned from the governing statute and the judicial decisions thereunder, is the ultimate measure of such a controversy. In *Magnolia,* the singular design of the Texas statute was affirmatively recognized as a limitation on the majority decision. Mr. Thomas' appeal to this Court is in harmony with that limitation. On the other hand, the distinction offered by Washington Gas Light was expressly dismissed by the *McCartin* Court. Therefore, on the basis of this Court's own precedent, the inquiry for this case must be whether the Virginia compensation agreement was intended to extinguish all of the

claimant's rights to compensation arising out of the accident, irrespective of where they might arise. On the basis of the same precedent, the answer to this inquiry lies in the structure of the Virginia Workmen's Compensation Act and the line of Virginia decisional law construing that Act.

2. *McCartin did not alter the mandate of the Constitution*

If the Virginia agreement is deserving of full faith and credit, the District of Columbia must accord that agreement the same weight and effect that Virginia does. It does not follow, however, that this Court's inquiry is restricted to whether or not a further recovery is available in Virginia. The District of Columbia is surely not compelled to give more faith and credit to the agreement than Virginia intended. Hence, if Virginia does not view its compensation remedy as having a preclusive effect on other compensation statutes, whether or not a further award is available in Virginia is irrelevant.

Part of the "effect" of the award in Virginia is what effect it is intended to have on other remedies. Thus, as a threshold inquiry, the nature of the remedy provided must be examined to determine if it is of such a character as to constitute a complete resolution of all the rights arising out of the accident. If it is not, there is no considered judgment by a sister state which, given full faith and credit, would constitute a bar to successive action by the District of Columbia. It is only when the award is intended to extinguish all other rights including parallel workmen's compensation remedies, that a second question is reached, to wit: Have the proceedings used in pursuit of the remedy

produced a record or judgment sufficiently final in nature and effect to be accorded full faith and credit and enforced against a sister state to accomplish its preclusive purpose?

The petitioner urges that this Court need not reach the second question. In its most elementary terms, this case is not principally a question of what state actions are entitled to full faith and credit. The real question is whether or not there is any conflict between the two compensation remedies which gives rise to a full faith and credit issue. The chief thrust of Mr. Thomas' position is that there is not. However, Mr. Thomas additionally urges that, should a conflict be found, the agreement by which he received his benefits should not be used to bar the District of Columbia award.

B. Given full faith and credit, the Virginia agreement did not constitute a bar to the District of Columbia award

1. *By virtue of an express statutory declaration*

The precedents cited by the Washington Gas Light Company in defense of the preclusive effect of the Virginia exclusive remedy provision on collateral compensation statutes ultimately beg the question. The broad language of the cases cited by the employer is not very helpful as it is thoroughly consistent with the general purpose of substituting compensation benefits for damages actions in the field of industrial accidents.[5]

[5] Contrary to the employer's claim, little weight can be given the Fourth Circuit's interpretation of the scope of the Virginia exclusive remedy provision in *Pettus*. In *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP*, 583 F.2d 1273 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979), another panel found that "it is obvious, especially from our discussion of the Virginia 'exclusivity' provision, that *Industrial Commission* v. *McCartin*, 330 U.S. 622, 67 S.Ct. 886, 91 L.Ed. 1140 (1947), not *Magnolia*, is controlling in this case, and that no valid full faith and credit issue is raised by the federal award." 583 F.2d at 1278. *See also, Biggs* v. *Norfolk Dredging Co.*, 360 F.2d 360 (4th Cir. 1966).

More importantly, an expansive reading of this language is inconsistent with other pronouncements by the Supreme Court of Virginia. That Court has on more than one occasion stated that: "The rights and remedies granted . . . are exclusive only as to an employee and his employer, and only his right to sue his employer for damages is barred by the acceptance of compensation under the Act." *Veale* v. *Norfolk and W. Ry.*, 205 Va. 822, at 825, 139 S.E.2d 797, at 799 (1965); *Fauver* v. *Bell*, 192 Va. 518, at 526, 65 S.E.2d 575, at 580 (1951).

The Fourth Circuit's result in the present case is particularly untenable in view of the Virginia legislature's specific provision in the Act for compensation awards by the Industrial Commission of Virginia following a compensation award by another jurisdiction. Va. Code § 65.1-61. Certainly, a provision by a state legislature *permitting* successive awards detracts from the prudence of regarding another section as *precluding* the same. It was certainly reasonable for this Court to apply similar reasoning in *Magnolia*. It is no less reasonable for this Court to take notice of the statutory posture of Virginia concerning successive awards. Regardless of whether the *Magnolia* majority's "caveat as to what it was *not* deciding" can be "elevated into a rationale" (Resp. Br. at 40), the provision for successive awards by Virginia is of equal dispositive force in the present case as the preclusion of successive awards by Texas was in *Magnolia*.

Washington Gas Light's response that the Virginia legislature's *imprimatur* on second awards is actually supportive of the Fourth Circuit's result is spurious. Two scenarios demonstrate the possible operation of the Virginia provision. Initially, an employee, whose injury is compensable in both Virginia and a foreign jurisdiction, might receive an award from the foreign jurisdiction *less* than the recovery authorized by Virginia for the same injury. The Virginia Code, § 65.1-61, authorizes the Virginia commission to issue an award which, combined with the claimant's earlier recovery, is equal to the total amount authorized in Virginia. However, as a second alternative, the employee's original award may be *greater* than any potential recovery from Virginia. The Virginia commission, though possessing jurisdiction over the claim, would not issue an award because the claimant's benefits already exceed his authorized remedy in Virginia. Nonetheless, the employee's extrajurisdictional recovery is *not* limited to the maximum benefits allowable in Virginia. Thus, it is abundantly clear that the object of the recovery limitation contained in the Virginia "foreign injuries" section is not to guarantee "that employers' maximum obligations would be determined by that statute." (Resp. Br. at 39).[6]

[6] In support of its position, the employer cites *Gasch* v. *Britton*, 202 F.2d 356 (D.C. Cir. 1953). The Fourth Circuit also relied heavily on *Gasch* in its disposition of *Pettus*. The case is of extremely questionable precedential authority. The *Gasch* decision was predicated upon inferring from a Maryland Court of Appeals decision that the statute's exclusive remedy section was an express prohibition of successive awards. Subsequently, in *Wood* v. *Aetna Casualty Company*, 260 Md. 651, 273 A.2d 125 1971), the Maryland Court of Appeals denied any intention to so hold and therefore upheld the right of a claimant to obtain an extrajurisdictional award subsequent to receipt of compensation in Maryland. Also ignored by the Fourth Circuit was a later D.C. Circuit case upholding a successive award in the absence of an explicit prohibition against seeking additional or alternative relief under the laws of another jurisdiction. *Director, OWCP* v. *Boughman*, 545 F.2d 210 (D.C. Cir. 1976) aff'g *Ekar* v. *Int'l Union of Operating Engineers*, 1 BRBS 406 (1975).

The true purpose of the limitation is to insure against double recovery by granting a credit for compensation previously paid under a less generous statute and preventing any further recovery where compensation has been paid under a more generous statute. By the terms of its Act, Virginia has merely declared that it will not be responsible for contributing to a total recovery that exceeds that authorized by *either* of the applicable compensation statutes.[7] The fact remains that to adopt the employer's suggested interpretation of the Virginia exclusive remedy provision is to hold that Virginia forbids the District of Columbia from exercising the same authority it reserves for itself when the tables are turned.

Finally, to whatever extent there is any doubt as to the proper scope of the Virginia exclusive remedy provision, this Court is reminded that Virginia has determined to construe its compensation statute liberally in favor of the injured employee in order to effectuate its humanitarian purpose. *Barker* v. *Appalachian Power Co.*, 209 Va. 162, 163 S.E.2d 311 (1968). The Supreme Court of Virginia has extended the rule of liberal construction to the provision in controversy. *Griffith* v. *Raven Red Ash Coal Co.*, 179 Va. 790, 20 S.E.2d 530 (1942). Partially out of deference to this principle of

[7] Similar provisions are common in most states statutorily recognizing successive awards. 4 A. LARSON, *The Law of Workmen's Compensation*, § 85.40 (1970).

construction, the *McCartin* Court refused to interpret a nearly identical provision "so as to cut off an employee's right to sue under other legislation passed for his benefit" without "unmistakeable language from the state legislature or judiciary." 330 U.S. at 628. The petitioner urges that faithfulness to this rule of construction, without an explicit prohibition by Virginia, compels recognition of the District of Columbia's authority to enforce its own statute.

2. *In the absence of an express statutory declaration*

The employer has sought to characterize Mr. Thomas' rights to compensation in Virginia and the District of Columbia as a single cause of action for which he is entitled but one recovery. Thus, the employer urges, Mr. Thomas may not resort to the District of Columbia Act after signing a workmen's compensation agreement in Virginia. In support of its restrictive view of Mr. Thomas' rights, the employer posits two principal contentions. First, the employer interjects that the grounds for recovery are the same in both jurisdictions, that is, "one jackhammer, one back, one injury." (Resp. Br. at 42). Additionally, the employer contends that Mr. Thomas' position is equivalent to "that of a plaintiff in a tort, wrongful death, or contract action." (Resp. Br. at 42). Unfortunately, the employer's position fails to account for certain peculiarities surrounding traditional workmen's compensation law.

In reality, Mr. Thomas' receipt of benefits pursuant to the memorandum of agreement is a far cry from a cause of action sounding in tort or contract that has been pursued to final judgment. It is true that the full

faith and credit clause was designed to require a plaintiff to try his whole cause of action at one time. However, this purpose presupposes a single cause of action ultimately governed by the dispositive law of a single state to the exclusion of all otners. Also presumed, is a forum with sufficient authority to consider the entirety of the claimant's rights and draw upon all the law bearing directly upon the claim. In the traditional common law action, these conditions are satisfied by the choice of law approach. Regardless of the forum within which the suit is brought, the forum is eventually forced to choose a single dispositive rule from the law of all interested states.

But unlike a common law damages action, a single dispositive law need not be chosen to determine the rights arising from an accidental industrial injury. This Court has long recognized the conflicts in the coverage of workmen's compensation statutes as one of the rare instances in which no choice of law need be made. *Alaska Packers Ass'n* v. *Industrial Accident Commission,* 294 U.S. 532 (1935); *Pacific Employers Ins. Co.* v. *Industrial Accident Commission,* 306 U.S. 493 (1939). These decisions have recognized workmen's compensation awards as a distinctive category separate from the ordinary tort or contract action. Both decisions combine to produce the unique circumstance that "more than one state is constitutionally empowered to determine the legal consequences of a single event by the application of its *internal law,* as distinguished from its *conflict of laws rule,* governing the subject." (emphasis added). Wolkin, *Workmen's Compensation Award—Commonplace or Anomaly in Full Faith and Credit Pattern,* 92 U.Pa.L.Rev. 401, at 407 (1944).

The decisions in *Alaska Packers* and *Pacific Employers* defy the employer's narrow view of workmen's compensation as a single remedy for a single injury. The thrust of the decisions was that both states may determine the consequences of events which transpire within their borders. Unlike traditional common law and statutory remedies (including wrongful death and survival actions), this Court ruled that one state need not restrain the enforcement of its workmen's compensation statute at the behest of a sister state with a superior interest. Such a circumstance points only to the independence of the two statutes and contradicts a single cause of action theory.

A second salient distinction between the Virginia compensation agreement and an ordinary judgment is the *capacity* of the forum to pick and choose from the laws of competing jurisdictions. As noted above, the forum court in a tort or contract action may select a rule from competing jurisdictions to govern the controversy before it. Thus, the law of all interested jurisdictions is brought to bear upon the claim. Through the application of choice-of-law principles, the entirety of the cause of action may be settled and the interests of each state may be vindicated. In contrast, the Industrial Commission of Virginia is only empowered to decide "questions arising under this Act."[8] Va. Code § 65.1-92. The commission may only pass upon the claimant's rights in Virginia. Mr. Thomas,

[8] The employer's speculation that Virginia's purpose in limiting the jurisdiction of the Industrial Commission was to statutorily predetermine the choice-of-law is improbable. Certainly by the language of § 65.1-92, a much more likely intent was merely to confine the jurisdiction of the administrative body to the area for which it was created and in which its expertise is to be relied upon.

therefore, had no opportunity to litigate his rights under the District's compensation statute.

Despite this unique difference, the employer persists in maintaining that Mr. Thomas may be equated with a plaintiff in a tort or contract action. In support thereof, the employer cites *Semler* v. *Psychiatric Institute,* 575 F.2d 922 (D.C. Cir. 1978) (Resp. Br. at 42), holding that a successful plaintiff in a wrongful death action in Virginia may not prosecute a similar action in the District of Columbia. Yet the District of Columbia Circuit expressly noted that a workmen's compensation claimant differs materially from a wrongful death plaintiff for the precise reason isolated above. 575 F.2d at 929 n. 41. Following its discussion of the impact of *Magnolia* and *McCartin,* the *Semler* Court concluded that:

> "... the central inquiry in determining whether a judgment in the first forum should bar a suit on the same transaction in the second forum is whether plaintiff has had the opportunity to raise the choice of law issue in the first forum."
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> 575 F.2d at 929 n. 41.

In addition to the choice-of-law pecularities, the employer's brief ignores a further lesson to be learned from the structure of the Virginia compensation system. The provision for supplementation by Virginia of parallel awards authorized by sister states is wholly inconsistent with a reading of Virginia workmen's compensation as a single remedy for a single cause of action. Surely implicit in the Virginia Act, and others of similar construction, is that the right to compensation therein provided does not—in fact, can not—represent a single cause of action equivalent to the right to damages for tort or breach of contract.

Little additional illustration is needed of the difficulty in equating workmen's compensation structure, procedure, and purpose with common law tort actions. Indeed, it is clear that workmen's compensation is a specialized system designed to remedy the inadequacies of traditional tort recoveries for industrial accidents. Compensation is more accurately viewed as a hybrid of tort and public accident insurance. *See generally* 1 A. Larson, *The Law Of Workmen's Compensation*, §§ 1.00-3.40 (1970). As Professor Larson, the most distinguished theoretician in the field of workmen's compensation, summarizes in his celebrated treatise:

> The sum total of these ingredients is a unique system which is neither a branch of tort law nor social insurance of the British or continental type, but which has some of the characteristics of each. Like tort, but unlike social insurance, its operative mechanism is unilateral employer liability, with no contribution by the employee, or state; like social insurance, but unlike tort, the right to benefits and amount of benefits are based largely on a social theory of providing support and preventing destitution, rather than settling accounts between two individuals according to their personal deserts or blame.
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> 1 A. Larson, *The Law of Workmen's Compensation*, § 1.20 (1970)

This explanation of workmen's compensation statutes is consistent with the particular design of the Virginia Act. The coverage of the Act is mandatory for all employers and employees, excepting those employees who have affirmatively waived its provisions prior to injury. Va. Code, § 65.1-23. In all cases where the employee has not waived coverage, the Act incorporates the terms of the statute into the contract of em-

ployment. Thus, the Supreme Court of Virginia, in *Fauver* v. *Bell*, 192 Va. 518, 65 S.E.2d 575 (1951), was led to comment on the nature and purpose of the Virginia Act:

> A consideration of the objects and purposes of workmen's compensatory legislation and the changes it wrought in the rules of the common law have been clearly and fully stated in many cases coming before this court. The legislation was for the beneficient purpose of providing compensation, *in the nature of insurance,* to a workman or his dependents, in the event of his injury or death . . . The pecuniary loss incident to the payment of the compensation is cast upon the employer as a part of the expenses of his business. (emphasis added) 65 S.E.2d at 577.

For the purpose of this Court's inquiry, Mr. Thomas' Virginia remedy more closely resembles recovery under a state authorized system of insurance against the risks involved in hazardous industrial employment than a cause of action in tort. The right to compensation under the Act is independent of the comparative fault of either party. The system is designed to function expeditiously and without the coercion of formal proceedings. The procedures followed in the instant case,[9] as encouraged by the state, were completely non-adversarial. Hence, as Professor Larson notes, ". . . tort litigation is an adversary contest to right a wrong between the contestants; workmen's compensation is a system, not a contest, to supply security to injured

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[9] The non-adversarial process by which Mr. Thomas received his benefits is quite common. Approximately 95% of all compensation benefits provided in the various states are secured in this manner. *Dillard* v. *Virginia Industrial Commission*, 416 U.S. 783, n. 2 (1974).

workers and distribute the cost to the consumers of the product." 1 A. Larson, *The Law of Workmen's Compensation,* § 2.70 (1970). Viewed in this light, successive awards by interested states authorizing more generous remedies should be encouraged in furtherance of the social policy which prompted the creation of workmen's compensation statutes, rather than restricted under a cumbersome comparison with causes of action sounding in tort or contract.

C. The constitutional obligation of full faith and credit should not be extended to the Virginia agreement so as to bar the District of Columbia award

Mr. Thomas has never disputed the fact that the Virginia agreement, as approved by the Virginia Commission, binds the parties to the terms of the recovery agreed upon as tightly as an adjudicated compensation award. However, the petitioner maintains that the *procedure* by which he secured his benefits is critical to the propriety of using those benefits as a bar to a further District of Columbia recovery—particularly in light of the preceding discussion of the nature and purpose of workmen's compensation. Mr. Thomas urges that, should a conflict be found between the Virginia agreement and the District award, there is room between the lines of the full faith and credit clause of Article Four to recognize the pecularities of the instant case.

Mr. Thomas was never a Virginia litigant. Mr. Thomas never filed a claim in Virginia. The only affirmative action attributable to Mr. Thomas in pursuit of Virginia compensation is his signing of an agreement while flat on his back in the hospital. Such agreements are encouraged as an expeditious, informal means of getting compensation benefits started to temporarily replace the disabled worker's employment income. Va. Code, § 65.1-45. None of the purposes of the full faith and credit clause in ending litigation is served by its application to Mr. Thomas.

Certainly, the means by which Mr. Thomas received compensation distinguishes his position from that of the claimant in *Magnolia.* Hunt, the employee, had pursued an adjudicated claim to a final lump sum award. This Court noted the goal of "the full faith and credit clause is to require a plaintiff to try his whole cause of action and his whole case at one time." 320 U.S. at 443-44. But to apply the same reasoning to Mr. Thomas would be to ignore reality. Mr. Thomas' position is more akin to that of the claimant in *McCartin* where the procedure used to secure benefits is voluntary, informal and non-adversarial. *See generally,* 4 A. Larson, *The Law of Workmen's Compensation,* § 85.50 (1970).

The purposes of full faith and credit were not advanced by the decision of the Fourth Circuit. Mr. Thomas' signature on the Virginia agreement does not constitute the kind of action which the full faith and credit clause was designed to reach. No provision by Virginia regarding the enforceability of such agreements can change the informality of the *procedure* involved. Simply put, the Virginia agreement, encouraged as an uncomplicated means of guaranteeing prompt relief to the disabled worker, should not be elevated to the level of *res judicata* judgments of a sister state, regardless of the ultimate enforceability of the informal agreement.

CONCLUSION

The Washington Gas Light Company's attempts to avoid the constitutional question must fail. Clearly, under the unambiguous language of the District of Columbia Act, Mr. Thomas' claim was timely filed. Indeed, only literal enforcement of the Act according to its terms satisfies the purposes which prompted the addition of § 30(f) to the Act. Nor can the claim be defeated by resort to the state coverage condition of § 3(a). According to the wisdom of longstanding precedent, the condition limiting coverage under the Longshoremen's Act to injuries not compensable under state law did not transfer to the Act's extension to the District of Columbia.

The ultimate question remains whether the agreement signed by Thomas effected a discharge of all of his rights under the law of his domicile, the District of Columbia. The answer is discovered in the structure of the statutory remedy that Virginia has provided. Of the many factors isolated which bear on this issue, the petitioner chooses to select for emphasis the legislative seal of approval given successive awards in Virginia. This explicit statutory sanction of successive awards is critical to the outcome of the instant case in three respects. First, the provision wholly distinguishes *Magnolia*. Secondly, the provision undermines any barrier to successive awards based on the Virginia exclusive remedy provision. Finally, the provision is logically inconsistent with the employer's contention that workmen's compensation recovery in Virginia is designed to be a single, indivisible cause of action.

Nor should the Court be offended by one state's supplementation of another's award. Compensation

was never designed to be a remedy for a wrong. Coverage is not based on fault. The recovery is not designed to make the claimant whole for his loss. Workmen's compensation simply represents a social policy aimed at insuring an employee against disabling injuries which cause loss of income and the means of support. To the extent that more than one state with a legitimate interest in the accident is willing to authorize compensation, no policy grounded in theory or practice has been advanced which should prevent the claimant's resort to the more generous recovery.

Respectfully submitted,

LEE C. ASHCRAFT
MARTIN E. GEREL
JAMES A. MANNINO
MARK L. SCHAFFER
JAMES F. GREEN
2101 L Street, N.W.
Suite 303
Washington, D.C. 20037

Attorneys for Petitioner